

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE DEALER MANAGEMENT SYSTEMS  
ANTITRUST LITIGATION, MDL 2817.

No. 18 C 864

Chicago, Illinois  
April 2, 2019  
4:38 p.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HON. JEFFREY T. GILBERT, MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:

MR. DANIEL V. DORRIS  
Kellogg, Hansen, Todd,  
Figel & Frederick, PLLC,  
1615 M Street, NW, Suite 400,  
Washington, DC 20036  
  
MR. ROBERT A. WALNER  
Milberg Tadler Phillips Grossman, LLP,  
One Pennsylvania Place, 19th Floor,  
New York City, New York 10119

For Defendant  
CDK Global:

MS. BRITT M. MILLER  
MR. ROBERT E. ENTWISLE  
MR. MATTHEW D. PROVANCE  
MS. NATALIE F. WAYNE  
Mayer Brown LLP,  
71 South Wacker Drive,  
Chicago, Illinois 60606

For Defendant  
Reynolds:

MR. BRIAN T. ROSS  
Gibbs & Bruns, LLP,  
1100 Louisiana Street, Suite 5300,  
Houston, Texas 77002

PATRICK J. MULLEN, Official Court Reporter  
219 South Dearborn Street, Room 1412  
Chicago, Illinois 60604  
(312) 435-5565

1 THE CLERK: 18 CV 864, In Re Dealer Management Systems  
2 Antitrust Litigation for emergency motion hearing.

3 THE COURT: Okay. Good afternoon. I'm in the  
4 courtroom, so we have the sound system on to record this  
5 hearing. I'd like counsel to identify themselves for the  
6 record if they anticipate speaking during this hearing. If you  
7 are on the phone but don't anticipate speaking but you want to  
8 be listed as having appeared of record, send an e-mail to  
9 Brenda Renozzi, my courtroom deputy, which is `brenda_renozzi --`  
10 `R-e-n-o-z-z-i-- @ilnd.uscourts.gov`. If anybody ever gets this  
11 transcript written, then Brenda can share that with the court  
12 reporter.

13 And then before you speak, even though you've  
14 identified yourself ahead of time, please state your name just  
15 so that the court reporter will get all that down, again, if  
16 somebody writes this. So let's go forward.

17 We're here on defendant CDK Global's emergency motion  
18 to take Cox's Rule 30(b)(6) data deposition off calendar due to  
19 late production of data and unresolved objections. I don't  
20 know what -- I have a courtesy copy of it. I suppose that  
21 would be ECF 610. Okay. Go ahead. Who's for CDK?

22 MR. ENTWISLE: (Via telephone) Your Honor, you've got  
23 Bob Entwisle from Mayer Brown representing CDK.

24 THE COURT: Okay. I cannot hear you. I cannot hear  
25 you. You may be on a speaker phone. So if you are, could you

1 pick up the headset?

2 MR. ENTWISLE: Okay.

3 MS. MILLER: (Via telephone) Good afternoon, Your  
4 Honor. Britt Miller of Mayer Brown on behalf of CDK Global  
5 LLC.

6 MR. ENTWISLE: And Bob Entwisle for defendant CDK.

7 THE COURT: Are you on a cell phone?

8 MR. PROVANCE: (Via telephone) Your Honor, also  
9 present are Matt Provance and Natalie Wayne from Mayer Brown.

10 THE COURT: Mr. Province, are all you guys on a cell  
11 phone? Because you're breaking up.

12 MS. MILLER: We're on a speaker phone, but we will  
13 dial in separately if you cannot hear us. Can you hear me,  
14 Your Honor?

15 THE COURT: You, I can hear, yes, Ms. Miller. I hear  
16 you fine. So I heard Provance, too, and someone else.

17 MS. MILLER: That was Robert Entwisle,  
18 E-n-t-w-i-s-l-e, also with Mayer Brown.

19 THE COURT: Right. Okay. Good.

20 And I suppose we have somebody here for Cox?

21 MR. DORRIS: (Via telephone) Good afternoon, Your  
22 Honor. It's Dan Dorris for Cox Automotive and its subsidiary.

23 THE COURT: Okay. Anybody else want to state their  
24 appearance of record?

25 MR. WALNER: (Via telephone) Good afternoon. Robert

1 Walner for the dealership plaintiffs.

2 THE COURT: Okay. Anybody else?

3 MR. ROSS: (Via telephone) Your Honor, this is Brian  
4 Ross on behalf of Reynolds.

5 THE COURT: Okay. Just chime in if you want.

6 (No response.)

7 THE COURT: Okay. Good.

8 Okay. I had a chance to quickly review CDK's motion,  
9 and I understand the issue for a decision is whether the  
10 deposition, the 30(b)(6) deposition of the Cox representative  
11 goes forward tomorrow. I know that our dep protocol says a  
12 dep, once on the calendar, cannot be moved without agreement of  
13 the parties or a court order, and there's no agreement of the  
14 parties at this point.

15 So, therefore, Cox is looking -- I mean, CDK is  
16 looking for a court order, and CDK would like an order that  
17 says they can take this deposition off, not on the date that  
18 it's noticed, but after that date and potentially after the  
19 close of discovery, which deadline is coming up, I guess.

20 I'm not exactly sure what the alternative is. So  
21 maybe CDK can briefly state its position in support of its  
22 motion. You know, an emergency motion hearing at 4:30 in the  
23 afternoon is not always the best place. Maybe I can ask you  
24 questions because I actually have read this. I didn't see in  
25 here when the request for production of these documents

1 actually first was served.

2 MR. ENTWISLE: Your Honor, this is Bob Entwisle from  
3 Mayer Brown. My understanding is that those requests were  
4 served in May of 2018.

5 THE COURT: Okay. Then I see the correspondence  
6 that's attached here. So, you know, within the last several  
7 weeks there's been back and forth on whether the production is  
8 complete and whether certain documents have or haven't been  
9 produced, right?

10 MR. ENTWISLE: That's correct, Your Honor. I would  
11 just hasten to add that there has been other correspondence and  
12 attempts to obtain data throughout the fall and then into the  
13 early part of the new year. We only attached to the motion the  
14 most relevant and most recent correspondence.

15 THE COURT: Okay. What's your position as to what  
16 should happen today? Do you have a date by which you would say  
17 the deposition or a date on which the deposition should be  
18 taken? Do you want it to be continued to a date to be agreed  
19 or ordered by the Court after you finish making sure you have  
20 the documents you need? What's your position?

21 And let me ask you this before you respond. Am I  
22 breaking up at all? Because sometimes I have the same problem  
23 with microphones in the courtroom. Can you guys hear me okay?

24 MR. DORRIS: Your Honor, you're breaking up.

25 THE COURT: Okay. I need to put the microphone

1 farther. Can you hear me better now?

2 MR. DORRIS: Yes.

3 THE COURT: Okay. If at some point I'm breaking up,  
4 could somebody just yell or send an e-mail to Brenda?

5 THE CLERK: Katie is on the call.

6 THE COURT: Okay.

7 MR. ENTWISLE: Yes, Your Honor.

8 THE COURT: Okay. What do you want? What do you want  
9 to happen here, Mr. Entwisle?

10 MR. ENTWISLE: Your Honor, what we would like to  
11 happen is we'd like an opportunity to assess the production  
12 that was provided to us. We want to be able to consult with  
13 our experts on it. Then we want to either do one of two  
14 things: address any issues if we can with Cox and get a  
15 complete production before going forward with the deposition,  
16 or if we're not able to do that, raise them with the Court just  
17 to have those objections resolved.

18 THE COURT: Okay. And when -- I can't really tell.  
19 When did you first start noticing that there were problems?  
20 When did you first start engaging Cox with this? When did you  
21 start realizing there was a problem? Was it early March, which  
22 is the first correspondence I'm seeing here, like March 6th or  
23 something?

24 MR. ENTWISLE: Your Honor, my understanding is that  
25 this has been an ongoing issue. There's been ongoing

1 correspondence where we think we've gotten the production and  
2 then we look and we determine that there are gaps or there are  
3 items missing. So I've come into the case more recently, but  
4 it was on March 6th where, you know, we laid out that this is  
5 the -- these are the open items that we believe that we're owed  
6 and raised that with opposing counsel.

7 THE COURT: Okay. Am I right that April 15th is the  
8 close of fact discovery?

9 MS. MILLER: No, Your Honor. The answer is that we  
10 per your order -- this is Britt Miller. Per our last status  
11 conference in front of Your Honor, the parties submitted a  
12 stipulation of revised dates to Judge Dow. It hasn't made it  
13 to the top of his stack yet, so he hasn't signed it. But the  
14 agreed date that is currently submitted is a close of fact  
15 discovery of April 30th.

16 THE COURT: Okay. Is that a stipulation that includes  
17 stuff other than fact discovery, other than discovery, which is  
18 why it went to --

19 MS. MILLER: Yes, Your Honor. Per our last appearance  
20 in front of Your Honor, it includes a revised date of the close  
21 of fact discovery as well as revised dates for the different  
22 expert disclosures that were contemplated by the original case  
23 management order. In the stipulation, as you may or may not  
24 recall, but in the stipulation and in our appearance before  
25 Your Honor, we listed out the number of things that were

1 outstanding and, of course, as you would expect, reserved our  
2 right to come back and seek additional time from Your Honor in  
3 the event situations like this arose and discovery could not be  
4 completed before April 30th.

5 THE COURT: Okay. You guys submitted this to Judge  
6 Dow to his proposed order file? Because I don't see it on the  
7 docket anyplace.

8 MS. MILLER: I don't have the docket sitting in front  
9 of me. It was filed as a stipulation, so it should appear on  
10 the docket and I believe an electronic copy was sent. But I'll  
11 have to go back and double-check to see if an electronic  
12 version was sent to his proposed order, but it was certainly  
13 filed as a stipulation on the docket.

14 THE COURT: Okay. Is it 553, stipulated amended case  
15 management order?

16 MS. MILLER: That sounds right, Your Honor. Again, I  
17 don't have it sitting in front of me, but that sounds correct.

18 THE COURT: Yes, I see it. So okay. I mean, I can  
19 look at it. I mean, it wasn't noticed at all before either of  
20 us. Do you know that he's aware of this?

21 MS. MILLER: There --

22 THE COURT: Because I could sign this.

23 MS. MILLER: Fair enough. Your Honor, again, I will  
24 have to double-check to see whether or not it was sent directly  
25 to his proposed order but, if not, we'll promptly follow up



1 with his clerk and alert her to its existence. The judge has  
2 previously encouraged us that to the extent a stipulation is  
3 not entered that we can approach his clerk and remind her that  
4 it is still pending and that they will address it. So after  
5 this call, well, I suppose Judge Dow will probably be leaving  
6 in the short term, but we will certainly reach out to his clerk  
7 in the morning and remind her and ask that she remind the judge  
8 that it is pending before him.

9 THE COURT: Okay. Because it looks like it was filed  
10 at least of record on March 5th. Okay. But you're proceeding  
11 under the understanding of that. That's fine.

12 All right. Let me hear from Cox. Mr. Dorris?

13 MR. DORRIS: Sure, Your Honor. I apologize that you  
14 don't have a written response from us. We frankly just learned  
15 of CDK's desire to move the deposition earlier this morning,  
16 but we are happy to submit a written response. If you allow me  
17 two minutes to step back and explain what this dispute is about  
18 from our point of view, I will try and be brief.

19 This is about a 30(b)(6) deposition of Cox that's  
20 supposed to occur on Thursday. It's on data issues. The  
21 topics generally ask Cox Automotive to interpret certain types  
22 of financial documents that Cox Automotive has already produced  
23 and asks questions about the manner in which Cox maintains  
24 data. It's not a fact deposition. It really is just a person  
25 in the financial department explaining certain financial

1 documents.

2 CDK has had these documents for a long time. That's  
3 how it's identified the documents for the deposition and how  
4 it's identified the topics for the deposition. We didn't learn  
5 of any complaint that CDK was not able to go forward with the  
6 deposition until 11:00 a.m. this morning, and the reason that  
7 CDK has given why the deposition should be postponed is this  
8 March 29th production. We don't believe that the documents are  
9 material to the deposition.

10 This production was made in response to CDK's request  
11 that we produce additional versions of financial documents that  
12 we've already produced. So CDK may have the version of the  
13 document from January, February, and March, but the April one  
14 is missing from the production. So we went back, we tried to  
15 find those documents, and we produced additional versions.  
16 Those aren't material to the deposition.

17 The deposition asks Cox's financial people to explain  
18 the documents. No particular version is really important to  
19 the deposition. So that's what's at stake, and the volume of  
20 that production is frankly quite modest for this case. There  
21 are 2,000 families of documents -- and that's e-mails plus  
22 attachments -- for comparison. Another defendant, CDR, which  
23 is represented by CDK's counsel as well, has produced over  
24 80,000 documents in their own deposition discovery, and like I  
25 said most of these documents are just cumulative with other

1 documents.

2 But to avoid any dispute about prejudice, we've made  
3 an offer to CDK that if it does find something new in the March  
4 29th production that it is not able to ask the witness  
5 questions about because of the timing of the production, we're  
6 glad to entertain responding in writing to those questions  
7 after the deposition.

8 This is really similar to an offer that CDK itself  
9 made to the plaintiffs in this case when it suggested that  
10 these types of data questions should be resolved by written  
11 questions. These are interpreting financial documents.  
12 They're not fact witness questions. If there are any follow-up  
13 questions, we can just address them in writing.

14 Now, to why we don't want to postpone the deposition,  
15 the parties have 29 other depositions scheduled this month.  
16 Trying to reschedule a deposition is a logistical challenge in  
17 itself. Plus the Cox Automotive representative has already set  
18 aside a date for the deposition on Thursday and is prepared to  
19 testify. It's not fair to that witness to have to set aside  
20 another day later in the month.

21 And my understanding from CDK's request is that they  
22 want the deposition after April 15th. The witness is not in --  
23 is traveling the week of April 15th and is traveling the week  
24 of April 30th. The only week available on her schedule is the  
25 week that there's also another two-day deposition of Cox, so

1 another two-day 30(b)(6) deposition of Cox.

2           So practically, I'm not going to say it's impossible  
3 but quite prejudicial to reschedule it, and there are four  
4 different sets of counsel scheduled to travel tomorrow morning.  
5 To try and reschedule the deposition, there's just no reason to  
6 do that given our offer to respond to any follow-up questions  
7 in writing.

8           THE COURT: CDK --

9           MS. MILLER: Your Honor --

10           THE COURT: CDK, let me ask you a question. Why is a  
11 solution here not to take the deposition, continue to look at  
12 the documents and if there are -- you know, I recognize the  
13 weasel word on this -- if there are documents that are new or  
14 not produced before, I suppose that could be subjectively  
15 determined, but follow up with written questions, or if you  
16 feel written questions would be insufficient because of the  
17 nature of the documents that you're looking at, convene the  
18 deposition even after the deposition close date either by  
19 agreement or on a motion to me and, you know, potentially  
20 allocate the cost of that deposition if late documents required  
21 it to Cox.

22           But why wouldn't it be to get on the plane, take the  
23 deposition to the best of your ability, and if there are  
24 additional documents that surface that need to be inquired into  
25 after you've done the first inquiry versus, well, we did our

1 inquiry and we really don't want to ask him any more about  
2 these additional documents now that we understand the data  
3 situation, but if there are things that need to be asked about,  
4 get an answer in writing or by agreement redepose the person at  
5 a mutually convenient time or get a motion to me that says the  
6 person needs to sit for additional deposition and Cox won't  
7 allow it? That at least allows the deposition to go forward as  
8 it's scheduled now, and it may be you'll get a lot of stuff  
9 accomplished.

10 MS. MILLER: Your Honor, this is Britt Miller. Thank  
11 you. We absolutely appreciate the Court's suggestion. I want  
12 to briefly say we take issue with a number of the statements  
13 Mr. Dorris just made with respect to the nature and  
14 characterization of the documents that were produced and his  
15 statements regarding CDR, which as Your Honor will recall  
16 wasn't even served discovery requests until much later than  
17 everyone else.

18 On the deposition on written questions point,  
19 Mr. Dorris is correct that we had previously offered a mutual  
20 exchange of depositions on written questions with respect to  
21 data so that we could avoid potentially having to take oral  
22 depositions. That offer was refused by plaintiff, and as a  
23 result we as defendants ultimately had to notice the 30(b)(6)s,  
24 the oral 30(b)(6)s, and use a number of their (inaudible) party  
25 depositions to notice these. So that's why we had to notice

1 these (inaudible).

2 So the belated offer to answer additional questions on  
3 written questions, although appreciated, we are concerned that  
4 that is the mechanism by which we largely got ourselves in this  
5 position in the first place, which was served objections,  
6 responses, meet and confer, letter writing campaigns, and the  
7 back and forth.

8 Now that Your Honor has introduced the possibility of  
9 us proceeding on Thursday, seeing how far we can get, our  
10 understanding that we may not have resolved either the nature  
11 of the documents or there are still outstanding objections that  
12 Cox had lodged that it will and will not prepare its witness to  
13 testify to, so that the parties can proceed on Thursday, get as  
14 far as they can, and then continue to work through any  
15 remaining issues that come out of that deposition when they are  
16 related to the objections or related to the documents, and then  
17 come to Your Honor if we cannot agree on another date whether  
18 inside the April 30th time period or outside of that time  
19 period, to start that deposition again and resolve those  
20 outstanding issues, CDK would be amenable to that.

21 It was our understanding from our conversations with  
22 the plaintiffs that that was something that they were not  
23 willing to entertain, and it was that this was our one and only  
24 shot at it. And if we proceeded with the deposition, they  
25 would be willing to, to use Mr. Dorris' word, entertain, not

1 necessarily respond to, but entertain questions on -- a  
2 deposition on some questions afterwards or follow-up in  
3 writing, but that they would not agree to producing a witness  
4 again to answer any follow-up questions.

5           If that's a possibility and Your Honor has indicated  
6 that you're willing to entertain such a motion, I'll be happy  
7 to proceed in that route to try to be as efficient as possible.  
8 Of course, if the witness is able to answer all of our  
9 questions, then we don't -- then it becomes a moot point.

10           But we brought this motion out of concern that if we  
11 do not bring the motion and, in fact, we're required to go take  
12 the deposition on Thursday, we would thereby, at least from  
13 plaintiffs' perspective, be estopped from taking any further  
14 deposition on data at all.

15           THE COURT: Well, based on what I know now, which is  
16 just the motion that CDK filed and what I've heard you talk  
17 about, you know, I'm alternating between ruling and trying to  
18 negotiate or facilitate a resolution here. Okay? I mean, if I  
19 have to rule, I'll rule. If I could facilitate a resolution,  
20 then I can do that.

21           I think based upon what you've said, Ms. Miller, and  
22 also my own experience in this area both as a lawyer and a  
23 judge, the written question mess can be a mess, particularly if  
24 you don't have two willing players on it. So, you know, I  
25 almost would reverse the presumption here. I think there's

1 a --

2 I mean, I don't know how much you don't know, CDK,  
3 about what you need to question about and what the issue is,  
4 but I appreciate Cox's position is: We've got a lot of deps to  
5 take. We're coming down to the end of this process, and even  
6 if you don't have perfect knowledge, perfect is the enemy of  
7 the good here.

8 But, I guess, I would reverse it and say that I would  
9 allow you, given the circumstances that I now understand, which  
10 is that there has been fencing about the 30(b)(6) topic areas  
11 and there's disagreement at the very least but also some real  
12 issues about whether some documents have been produced, I'd say  
13 go ahead with the deposition and that I would allow CDK to  
14 reconvene the deponent, the 30(b)(6) deponent, unless the  
15 parties can agree that follow-up questions can be done in  
16 writing.

17 And I would reserve judgment as to who pays for the  
18 reconvened deposition, you know, but I would say that if Cox is  
19 being unreasonable either in producing documents or in  
20 producing a witness on particular topics or in answering  
21 questions, at least it's conceivable to me that the second  
22 deposition Cox would have to pay the cost of it as something.  
23 I'm not saying that that would happen now, and that would  
24 probably have to happen by motion.

25 But I'd rather have the deposition go forward if there



1 is enough that examination can be conducted on that CDK knows  
2 rather than postpone an entire deposition because you don't  
3 know everything. I'd rather have you go forward on what you  
4 know, continue to figure out what you don't know and whether it  
5 even matters with the -- and, you know, I would say then that  
6 the deponent can be redeposed either before or after or the  
7 deposition wouldn't -- you know, redeposed or continued either  
8 after the close of discovery or before unless the parties can  
9 agree that additional questions can be answered in writing.

10 And if anybody has a problem with what's going on, you  
11 know my address just like you found me now. I appreciate  
12 you're not finding me as much, but I get why it was necessary  
13 to come in on this. I guess that's my proposal on the  
14 facilitative end and, you know, even on the judicial resolution  
15 end, too, depending upon what you guys tell me.

16 MS. MILLER: Your Honor, for CDK, we're happy to  
17 prepare -- to proceed in that manner.

18 MR. DORRIS: This is Dan Dorris on behalf of Cox. The  
19 only concern I have with the proposal -- and I understand if  
20 that's Your Honor's rule and we will go with it -- is we think  
21 there should be some showing on CDK's behalf of the reason why  
22 the deposition should be reconvened. We don't think these  
23 documents are material to the case, and if there's an automatic  
24 reconvening of a deposition it's just a second bite at the  
25 apple to ask questions that could have been asked at the first

1 deposition.

2 THE COURT: Yes, and that's not my intention. I  
3 understand the apprehension about that, but again I think I'm  
4 trying to be clear that the deposition would be reconvened  
5 unless -- I don't even have to say the parties agree -- unless  
6 the follow-up questions can be conducted efficiently in  
7 writing.

8 So, you know, I'm giving CDK the option, and maybe  
9 they'll say now they don't agree with what I'm saying if I'm  
10 changing this, but I don't think it's a real change. But what  
11 I'm saying is I'm going to give them -- I don't know what the  
12 issues are yet, and I don't know if there's going to be a need  
13 for there to be a reconvened deposition versus answers in  
14 writing. Sometimes these things look a lot more serious at  
15 this end of the telescope than they look at the other end once  
16 you're there.

17 But, you know, if they are right that documents were  
18 not produced or were produced in a corrupted way which would  
19 have been the subject of examination at the deposition and they  
20 didn't have them in advance of the deposition and it doesn't  
21 make sense to do it in writing, I would say they can reconvene  
22 the deposition. But if it does make sense to do it in writing,  
23 I would hope that they would do it to spare the expense and  
24 that you would agree to it, too. I'm just trying to give you  
25 an incentive to do it rather than have the dep convene.

1           So I've probably talked over everything now, and I can  
2 restate it in an order form.

3           MS. MILLER: Your Honor, I believe we understand what  
4 Your Honor is saying, and we understand that, of course, we are  
5 not looking to waste the Court's time or waste deposition time  
6 as unnecessary. But to the point that Your Honor just made, we  
7 don't know what we don't have, and we don't know whether what  
8 they've produced is what we asked for, and we will not have an  
9 opportunity, given at least from what we can tell that there  
10 are a number of documents that are corrupted or don't have file  
11 extensions and we've been told that we should go try to fix it  
12 before we further complain, we don't know if we'll have an  
13 opportunity to fix those before Thursday.

14           But we appreciate, you know, if it turns out that we  
15 have all the documents that we have asked for and we are able  
16 to serve targeted questions, what does this data field mean,  
17 we're not going to be looking to reconvene a deposition to ask  
18 that question. But it's simply a situation that we don't know  
19 what we don't know, so we are happy to proceed as Your Honor  
20 suggests and see what Thursday reveals and what it does not.

21           MR. DORRIS: Your Honor, this is Dan. Oh, sorry to  
22 interrupt.

23           THE COURT: No, go ahead.

24           MS. MILLER: No, I'm done, Dan. Go ahead.

25           MR. DORRIS: This is Dan. I think with my

1 understanding now that we are also on board with that process,  
2 and let me just restate it to make sure we're all clear on the  
3 record and there's no ambiguity later. My understanding is  
4 that after the deposition and CDK reviews the documents that it  
5 will identify any areas of inquiry that it thinks it wasn't  
6 able to get into, and then the parties will confer about that  
7 and, if necessary, the appropriate way to address those. If  
8 that's the ruling here, we're on board with that. We're, of  
9 course, going to comply with that.

10 The only concern I had is the presumption of an  
11 automatic new deposition unless we moved for a protective order  
12 on topics that we weren't sure what CDK wanted to address at  
13 the second deposition.

14 MS. MILLER: And, Your Honor, to be clear, that's not  
15 my understanding of what we're talking about. We certainly  
16 have the 4500 documents that were produced on Friday which we  
17 haven't gotten through, but we are also -- this data deposition  
18 is going to the types of data of Cox and its subsidiaries in  
19 its chain and the various issues about the types of data. We  
20 do not know as we sit here, beyond representations of counsel,  
21 that, in fact, we have everything we asked for. So there may  
22 be additional documents that we still do not have even in that  
23 production on Friday.

24 Also, there were objections served just this past  
25 Thursday to the deposition notice in which Cox has taken

1 certain positions as to what their witness will and will not be  
2 able to testify to. That may be a lawyer's artifice and it may  
3 be a distinction without a difference, but until we get the  
4 witness on the stand and inquire as to that person's knowledge  
5 and as to the files we have and whether there are other files  
6 we do not have, we certainly can't make a representation that  
7 any additional questions we may have, whether in (inaudible) or  
8 in a secondary deposition, will be about just those 4500  
9 documents that were produced. There may be additional material  
10 that we yet do not have about which we'd like to ask questions  
11 under the guise of understanding the data that is going to be  
12 at issue in this case.

13           So I had understood Your Honor's just (inaudible)  
14 suggestion to the parties that we go on Thursday, see how far  
15 we get, and if there are additional questions open either about  
16 the documents that were just produced that we didn't have the  
17 opportunity to ask about or there are additional documents or  
18 additional information that we don't have that relate to the  
19 data questions that we served, we would have the ability to  
20 reconvene that deposition orally if the parties could not agree  
21 to try to resolve it by written questions.

22           THE COURT: Okay. So we're all trying to state  
23 something. Let me try my hand at it. I'm just making a note  
24 here.

25           (Brief pause.)

1 THE COURT: Okay. Here's my attempt at this which  
2 would be memorialized in an order that would say, you know, the  
3 telephonic hearing of this motion. The deposition of -- who's  
4 the name of the deponent?

5 MR. DORRIS: Tammy Guadalupe.

6 THE COURT: Well, actually the 30(b)(6) deposition of  
7 Cox Automotive, right?

8 MR. DORRIS: Yes.

9 MS. MILLER: Cox Automotive on data.

10 THE COURT: On data noticed for April 4th, right?

11 MS. MILLER: Yes, Your Honor.

12 MR. DORRIS: Yes.

13 THE COURT: It will proceed as scheduled. If it turns  
14 out that Cox has not produced reasonably before the deposition  
15 documents requested by CDK that CDK needs to examine the  
16 witness on the noticed 30(b)(6) topics -- and I guess I would  
17 add here -- or the parties have not resolved their dispute  
18 about appropriate 30(b)(6) topics sufficiently before the  
19 deposition begins, then CDK can resume the deposition of the --  
20 can resume the 30(b)(6) deposition unless the parties agree  
21 that any additional inquiry CDK wants to conduct can be done on  
22 written questions. If the parties cannot reach agreement, they  
23 can come back to the Court at that time.

24 The Court reserves -- well, I would say the resumed  
25 deposition can occur either before or after the close of fact

1 discovery, and the Court reserves the ability to allocate the  
2 cost of any resumed deposition based on a more complete record  
3 and argument.

4 Let me throw that out there to you guys. How does  
5 that sound to you all?

6 MS. MILLER: That is fine by CDK, Your Honor.

7 MR. DORRIS: This is Dan Dorris. I think that what we  
8 would ask for is just the default rule on any deposition. If  
9 CDK believes any documents haven't been produced that gives  
10 them sufficient time to question the witness, it can make a  
11 motion and show good cause why there should be continuing need  
12 for a deposition.

13 THE COURT: Well, that's the motion that they have  
14 now. That's the motion that they filed now, and what they're  
15 telling me now is that there's good cause to believe that they  
16 don't have all the documents or that some of the data has been  
17 corrupted. You guys disagree with that, but I haven't heard  
18 anything. You know, they say, they say -- you know, they say  
19 that, and you say, well, we don't think so. I don't know who's  
20 right, and I can't delve into it.

21 MR. DORRIS: Right.

22 THE COURT: And I was not intending to kick the ball  
23 down the road like that. You know, alternatively, I think,  
24 Mr. Dorris, what I would say is, you know, not go through all  
25 the rest of the verbiage here which I think is protective of

1 you and say the deposition shall go forward and CDK can resume  
2 the deposition at Cox's expense in the future to address  
3 documents that, you know, were produced late or were not  
4 produced before the deposition or something like that.

5 I mean, you can't have your cake and eat it, too. You  
6 know, you want the deposition to go forward. You've got 29  
7 depositions on the schedule. I'm trying to accommodate that  
8 interest, but I'm trying not to nail CDK for going forward with  
9 the deposition. I mean, their original motion here is: Don't  
10 make me take it now at all, Judge. Reschedule it sometime  
11 later.

12 And, you know, I recognize you're saying the deponent  
13 may not be available, that there's four sets of lawyers getting  
14 on planes. So I'm trying to do that. But, I mean, you know,  
15 if you want to do that --

16 MR. DORRIS: Oh, completely understood, Your Honor.  
17 We're asking for --

18 THE COURT: If you want to preserve this argument  
19 later, I'm going to enter a different order today.

20 MR. DORRIS: I completely understand. We're happy  
21 with your version of the order. We will confer with CDK after  
22 the deposition about any questions that they believe they did  
23 not have an opportunity to ask and the best way to address  
24 them.

25 THE COURT: Yes.



1 MR. DORRIS: Consistent with your order.

2 THE COURT: Okay. To be clear to both sides -- and I  
3 think Ms. Miller understands this -- I'm not trying to give  
4 them a Mulligan here. I'm not saying to take the dep and then  
5 you have free rein to do it again. I mean, I'm trying to cabin  
6 it in a way that, you know, is based on the documents that were  
7 produced.

8 But, you know, you guys are coming down to the wire  
9 and you're arguing about 30(b)(6) topics and whether you have  
10 all the documents, and everybody would like to get this stuff  
11 done. And my best guess is that going forward with the  
12 deposition, nine times out of ten you're able to ask -- you've  
13 got enough to ask enough to get what you need. And certainly  
14 after the deposition on these data issues CDK will be much more  
15 informed about what the witness knows, what the data -- what  
16 the documents show, what the data issues are, and so probably  
17 can ask much more focused questions in the future that either  
18 would be the subject of a written question or, you know, a much  
19 more focused deposition.

20 But, you know, I'm faced at least on a prima facie  
21 basis with an argument that the docs were produced late and,  
22 you know, there wasn't complete cooperation here. So, you  
23 know, I'm trying to deal with all that here. You know, I think  
24 this is probably the best we can do right now. You'll go  
25 forward with the deposition. If there's a problem in the

1 future, there's a mechanism to try and work it out. Then if  
2 you can't work it out, you know where I am.

3 Or like the stipulation before, just give it to Judge  
4 Dow. I'm just kidding, and I know if he reads the transcript  
5 he would laugh when I said that, too.

6 (Laughter.)

7 MR. DORRIS: All right. Thank you, Your Honor.

8 MR. ENTWISLE: Thank you.

9 THE COURT: Okay.

10 MS. MILLER: Thank you, Your Honor.

11 THE COURT: All right. I'm looking at your stipulated  
12 motion here. I see the reason you gave it to him, because it  
13 extends to Daubert. Okay. I will also let him know that it's  
14 sitting there. I know you'll talk to his courtroom deputy, but  
15 somebody will sign that.

16 MS. MILLER: Thank you, Your Honor.

17 MR. DORRIS: Thank you.

18 THE COURT: Okay. Bye-bye.

19 (Proceedings concluded.)

20 C E R T I F I C A T E

21 I, Patrick J. Mullen, do hereby certify the foregoing  
22 is an accurate transcript produced from an audio recording of  
23 the proceedings had in the above-entitled case before the  
Honorable JEFFREY T. GILBERT, one of the magistrate judges of  
said Court, at Chicago, Illinois, on April 2, 2019.

24 /s/ Patrick J. Mullen  
25 Official Court Reporter  
United States District Court  
Northern District of Illinois